

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RONALD KIM,

Plaintiff and Appellant,

v.

DONALD KIM et al.,

Defendants and
Respondents.

B277997

(Los Angeles County
Super. Ct. No. BC559589)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Mel Red Recana, Judge. Affirmed.

Law Office of Ronald G. Kim and Ronald G. Kim for
Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Robert P.
Wargo and Rinat Klier-Erlich for Defendants and Respondents,
Donald Kim, Jean Kim, Jisoo Suh, Sam Chang, Suzie Cho and
The Mercury Property Owners Association.

Ronald Kim appeals the judgment entered after the trial court sustained without leave to amend the demurrer of Donald Kim, Jean Kim, Jisoo Suh, Sam Chang, Suzie Cho and The Mercury Property Owners Association (MPOA) to Kim's third amended complaint for fraud, defamation, negligent misrepresentation and negligence. On appeal Kim argues the trial court erred in ruling he had failed to allege either an enforceable promise or other facts with sufficient specificity to support his causes of action for fraud and negligent misrepresentation and had also failed to allege breach of a cognizable duty owed to him by MPOA in support of his negligence claim.¹ In addition, Kim contends the court erred in denying leave to amend the pleading. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Turmoil at the MPOA

The Mercury, a large, mixed-use residential and commercial property located in the Wilshire Center neighborhood of Los Angeles, is governed by the MPOA. Mark Zinny was president of MPOA's board of directors in 2011. During his tenure several board members and other condominium owners and members of the MPOA became dissatisfied with Zinny's performance and the dysfunction of the MPOA board and encouraged Kim, an attorney, to run for president.

Kim was elected MPOA board president on December 16, 2011. According to Kim's third amended complaint, on election night, after the announcement of the election results, Donald

¹ Kim does not appeal the trial court's ruling sustaining the demurrer to his defamation cause of action without leave to amend.

Kim and Jean Kim urged the condominium owners present to support Chang as president, rather than Kim. The new board nonetheless confirmed Kim's election as president. Chang was elected treasurer/chief financial officer. Suh was elected board secretary.

In November 2012 a recall election was held. Kim and the other members of the board who had been elected in December 2011 were all recalled.

2. Kim's Lawsuit

Kim filed his initial complaint on October 2, 2014, naming Donald Kim, Jean Kim, Suh and the MPOA as defendants and alleging causes of action against all defendants for fraud and conspiracy to defraud, breach of fiduciary duty and conspiracy to breach fiduciary duty, negligent misrepresentation, negligence, breach of oral contract and breach of the implied covenant of good faith and fair dealing. Kim filed a first amended complaint on November 12, 2014, adding Chang and Cho as defendants, but alleging the same six causes of action as to all defendants. The gravamen of Kim's complaint was that, notwithstanding their promises to support him as MPOA president, the individual defendants not only failed to do so but also affirmatively acted to undermine his position. The trial court sustained defendants' demurrer to each cause of action, giving Kim leave to amend the tort claims but denying leave to amend the causes of action for breach of oral contract and breach of the implied covenant because the alleged breach had occurred on December 16, 2011, more than two years before the lawsuit was filed.

Kim filed a second amended complaint on June 8, 2015, which alleged causes of action for fraud and negligent misrepresentation against all defendants and for breach of

fiduciary duty and negligence against the MPOA only. Defendants again demurred. The court sustained the demurrer and, after initially indicating leave to amend would not be permitted, granted Kim leave to file a third amended complaint.

The third amended complaint (the operative pleading) was deemed filed on February 8, 2016. It continued to allege causes of action for fraud and negligent misrepresentation against all defendants and negligence against only the MPOA (and Doe defendants). It also added a new cause of action for defamation against all defendants.

In paragraph 15 of the third amended complaint Kim alleged, from August 2011 and thereafter, the individual defendants “made repeated verbal promises and representations to [Kim] during face to face meetings with him on the premises of the Mercury that (1) each of them would fully support and campaign for his election as president of the MPOA board if he agreed to run as a candidate for president of the MPOA board; (2) that . . . if he ran and were elected, each of them would fully support him during this two year term as president of the MPOA including by *inter alia* organizing and engaging in an outreach campaign to obtain and continuously sustain the support of each of them and the community of Mercury homeowners; and (3) that . . . if he ran and were elected, they would fully support his efforts during his two year term as president of the MPOA to remedy the dysfunctional governance issues plaguing the MPOA.” When Donald Kim made these representations, Kim further alleged, he was acting as the interim president of the MPOA and informed Kim he was making the promises on behalf of, and with the authority of, the MPOA, as well as himself personally.

Kim alleged he was hesitant to devote the time that would be required to serve as president of the MPOA board because of his busy law practice and his family obligations, including to his toddler son, and expressed his reluctance to defendants. Defendants persisted in their efforts to persuade Kim and assured him their sole interest in encouraging him to serve on the board was to protect the MPOA and The Mercury community. Ultimately, in reliance on defendants' representations and promises, and in light of their repeated urging that his skills and expertise as a lawyer were needed to protect the MPOA community, he agreed to run for president. Thereafter, he campaigned for the office for three months and spent approximately \$500 for campaign materials.

According to Kim, defendants knew, when promising to support him, that their promises were false and that they had no intention of honoring them. Indeed, beginning on election night, when Donald Kim and Jean Kim attempted to replace him with Chang as president, defendants cooperated with each other "in a pattern of misconduct to obstruct and subvert [Kim] and the lawful functioning of the 2011 Board under [Kim's] administration as board president." Kim further alleged defendants intended their promises to induce him to spend time and effort on their behalf and on behalf of the MPOA. Kim, meanwhile, was ignorant of the falsity of the promises and, he alleged, actually and justifiably relied on them.

In his negligence claim Kim alleged the MPOA owes a general duty of care not to create an unreasonable risk of harm to its homeowner members, including him. The MPOA breached that duty, Kim alleged, by making through Donald Kim, its interim president, false promises of support and by publishing

various false and defamatory statements about Kim in the MPOA monthly newsletter.

3. *The Trial Court's Ruling Sustaining the Demurrer Without Leave To Amend*

Defendants once again demurred to Kim's pleading. After receiving opposition and reply memoranda and hearing oral argument, the trial court sustained the demurrer without leave to amend, "affirming" its earlier issued tentative ruling.

With respect to Kim's fraud cause of action, the court explained Kim had not alleged facts sufficient to support an action for promissory fraud: "Plaintiff does not allege an actionable promise—i.e., a promise to do a *particular thing*. It is not enough to promise to *support* a candidate or issue This is because 'support' is not sufficiently definite enough to constitute a particular act." The court also ruled, given the nature of a promise of political support, defendants were necessarily free to change their minds; and, as a consequence, "[i]t was also not reasonable for Plaintiff to rely on unconditional promises of support." Finally, the court found, as it had in its previous rulings, Kim's fraud claim lacked sufficient factual specificity: "He does not identify who promised what, when each promise was made, and why he relied on that promise."

As to the defamation cause of action, the court sustained the demurrer both because Kim had not been granted leave to add a new cause of action when the court permitted the filing of the third amended complaint and because the cause of action was barred by the governing one-year statute of limitations (Code Civ. Proc., § 340, subd. (c)).

The court ruled Kim's cause of action for negligent misrepresentation, like his fraud cause of action, lacked the

requisite specificity. In addition, citing *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458, the court noted the claim was based exclusively on representations about the future, which are not actionable as negligent misrepresentations. Finally, as to Kim’s negligence cause of action against the MPOA, the court ruled the general duty of care alleged “does not encompass the sort of conduct that Plaintiff is alleging.”

Noting that Kim had been unsuccessful in his prior attempts to cure the defects in his complaint and had not demonstrated in what manner he could do so if permitted to file a fourth amended complaint, the court denied further leave to amend.²

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court’s ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v.*

² In addition to sustaining the demurrer without leave to amend, the court deemed moot the motion to strike filed by defendants concurrently with their demurrer and denied their motion for sanctions.

City of Los Angeles (2003) 31 Cal.4th 1074, 1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1203.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

“Where the complaint is defective, “[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint.”” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) We determine whether the plaintiff has shown “in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) “[L]eave to amend should *not* be granted where . . . amendment would be futile.” (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Ivanoff v. Bank of America, N.A.*, *supra*, 9 Cal.App.5th at p. 726.)

2. *The Trial Court Properly Sustained the Demurrer to Kim’s Third Amended Complaint*

a. *Kim did not allege facts sufficient to support his promissory fraud cause of action*

“The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.’ [Citations.] [¶] ‘Promissory fraud’ is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the

intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.” (*Lazar v Superior Court* (1996) 12 Cal.4th 631, 638; accord, *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1453 [the elements of promissory fraud are “(1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the [promisee]”].)

“As with any other form of fraud, each element of a promissory fraud claim must be alleged with particularity.” (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498; accord, *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060; see *Lazar v. Superior Court, supra*, 12 Cal.4th at p. 645 [“fraud must be pled specifically; general and conclusory allegations do not suffice”].) To sufficiently plead “the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise” the complaint “must state “‘facts which ‘show how, when, where, to whom, and by what means the representations were tendered.’”” (*Beckwith*, at p. 1060, quoting *Lazar*, at pp. 639, 645; see *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156 [particularity requirement applies to each element of fraud, which must be pleaded “factually and specifically”].)

“Promises too vague to be enforced will not support a fraud claim any more than they will one in contract.” (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216, disapproved on

another ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1328, 1251; see *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 “[t]o be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages”]; see also *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1044 [to support a claim for promissory estoppel, the promise must be “clear and unambiguous in its terms”].)³

In his third amended complaint Kim alleges the individual defendants falsely promised that, if he ran and were elected president of the MPOA board, they would fully support him during his two-year term as president, including by organizing and engaging in an outreach campaign to maintain the support of the other homeowner-members of the MPOA.⁴ This purported

³ “The elements of both causes of action [(promissory fraud and promissory estoppel)] are virtually identical with the exception of one element. In a promissory fraud case, a plaintiff must establish that the defendant did not intend to perform the promise when it was made.” (*Helmer v. Bingham Toyota Isuzu* (2005) 129 Cal.App.4th 1121, 1130; see *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 231 “[t]he elements of [promissory] fraud are similar to the elements of promissory estoppel, with the additional requirements that a false promise be made and that the promisor know of the falsity when making the promise”].)

⁴ As discussed, Kim also alleged the individual defendants promised they would support and campaign for his election as president of the MPOA board. Although Kim included this promise among those he alleged were intentionally false, his third amended complaint acknowledges he was, in fact, elected

promise, as the trial court ruled, was simply too vague and indefinite to be the basis for a promissory fraud action. The scope of the duty allegedly assumed by the defendants when they promised their full support to Kim for a two-year presidential term cannot be rationally determined, and the limits of their performance cannot be sufficiently defined for this promise to be actionable. (See *Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at p. 770.)

In addition, as the trial court also ruled, despite repeated opportunities to amend his complaint to provide the requisite factual specificity, Kim was able to allege only in the most general terms the “who,” “when” and “where” necessary to adequately plead his fraud cause of action. Kim alleged that from “August 2011, and continuing repeatedly thereafter,” presumably until election night December 16, 2011, Donald Kim, Jean Kim, Chang, Suh and Cho, referred to collectively, made the alleged false promises of support “during face to face meetings with him on the premises of the Mercury.” Which of the five defendants made what particular promise or representation during this four-and-one-half-month period is never stated. Nor does Kim identify where on the premises of The Mercury, which he describes as a large, mixed-use condominium project, the allegedly false promises were made. These broadly sweeping allegations fall well short of the specificity needed to plead a fraud cause of action.

president and identifies only post-election conduct by the defendants as demonstrating their various representations to him were false.

b. *Kim did not allege facts sufficient to support his cause of action for negligent misrepresentation*

“The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” (Bock v. Hansen (2014) 225 Cal.App.4th 215, 231; see Thrifty Payless, Inc. v. The Americana at Brand, LLC (2013) 218 Cal.App.4th 1230, 1239.) In order to state a claim for negligent misrepresentation, the “actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.” (Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells (2000) 86 Cal.App.4th 303, 309-310.) A “promise to perform at some future time” does not “involve a past or existing material fact” and therefore will not support a cause of action for negligent misrepresentation. (Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 158; accord, *Stockton Mortgage, Inc. v. Tope, supra*, 233 Cal.App.4th at p. 458 [“[a]lthough a false promise to perform in the future can support an *intentional* misrepresentation claim, it does not support a claim for *negligent* misrepresentation”].)

Kim’s third amended complaint alleged as the basis for his negligent misrepresentation claim the same purportedly false promises of future support for his presidency of the MPOA board as alleged in connection with his fraud cause of action. Those promises, even had they been pleaded with the requisite specificity, are not actionable as negligent misrepresentations.

c. *Kim did not allege facts sufficient to support his negligence cause of action against the MPOA*

The elements of a negligence action are a legal duty of care, breach of that duty and proximate cause resulting in injury. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; see *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 500.) “Duty is indeed the cornerstone of every negligence claim. In California, the general rule governing duty is codified in Civil Code section 1714, subdivision (a): ‘Everyone is responsible . . . for any injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person’ Thus, ‘each person has a duty to use ordinary care and “is liable for injuries caused by his failure to exercise reasonable care in the circumstances”’ [Citation.] Whether a party has a duty of care in a particular case is a question of law for the court, which we review independently on appeal.” (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 163; accord, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1012 [“The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court”].)

As alleged by Kim and conceded by the MPOA, the only named defendant in Kim’s cause of action for negligence, a homeowners association owes a general duty of care with respect to matters within the association’s control. (See *White v. Cox* (1971) 17 Cal.App.3d 824, 831 [condominium association may be

sued by one of its members for injuries caused by its negligent maintenance of the common areas of the condominium project]; see also *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1558 [homeowners association owes certain fiduciary duties to its membership]; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [same].) Recognition of this general principle of duty notwithstanding, Kim failed to allege facts supporting a valid cause of action for negligence against the MPOA.

In paragraph 51 of the third amended complaint, Kim alleged the MPOA breached its duty, owed to him, to exercise reasonable care not to create an unreasonable risk of harm by “authoriz[ing] and commit[ing]” two categories of wrongful conduct: Donald Kim’s false promises of support for Kim’s presidency if elected, purportedly made prior to the December 2011 election on behalf of the MPOA, and publication of defamatory statements about Kim in the association’s monthly newsletter subsequent to his election as president. The first category, set forth in paragraph 51(a), is merely a restatement of Kim’s cause of action for negligent misrepresentation and fails for the reasons discussed in the preceding section of this opinion.

The second category, which enumerates in paragraph 51(b) several allegedly defamatory statements from the newsletter between May 2013 and August 2013, is simply Kim’s defamation claim in a slightly different guise. (Cf. *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 274 [California has adopted a negligence standard for private figure plaintiffs seeking compensatory damages in defamation actions].) As the trial court ruled, even if Kim’s cause of action for defamation were properly included in his third amended complaint, it would be barred by

Code of Civil Procedure section 340, subdivision (c)'s one-year limitations period because his initial complaint was not filed until October 2014, more than 12 months after the final monthly newsletter identified in the pleading. Kim did not appeal either aspect of the trial court's ruling sustaining the demurrer to the defamation cause of action. He cannot elude those fatal defects by recasting the defamation claim as one for simple negligence.

Kim also alleged the MPOA breached its duty of care "by engaging in the actions alleged in paragraphs 25 [(which describes defendants' alleged obstruction of Kim's presidency following his election)] and 26 [(which describes defendants' allegedly wrongful activity in instigating the November 2012 recall election)]" As discussed, in sustaining the MPOA's demurrer, the trial court ruled the association's duty of care did not encompass the misconduct alleged by Kim—that is, the MPOA owed no duty to Kim to act reasonably in order to protect whatever interest he might have in serving as board president. (See *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.*, *supra*, 1 Cal.5th at p. 1012.) We agree. Kim has cited no authority, and we are aware of none, that supports his contention the MPOA's general duty of care, which includes such matters as maintaining the common areas of the project in a safe condition, extends to its activities in connection with rival factions vying for control of the association's board. (See generally *Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 549 ["[a]ppellant bears the burden of demonstrating that the trial court erred in sustaining the demurrer"].)

To be sure, if a member of a homeowners association could allege in good faith the association, through one or more of its

officers or agents, aided in the commission of a fraud, the intentional infliction of emotional distress or defamation in connection with a board election, the association would potentially be liable for that tort. Here, however, for the reasons discussed, the trial court properly sustained defendants' demurrer to those causes of action as alleged by Kim.

3. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

“If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.’ [Citation.] “The burden of proving such reasonable possibility is squarely on the plaintiff.” [Citation.] To satisfy this burden, “a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading’” by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action.” (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.)

In support of his request for yet another opportunity to amend his pleading, Kim advised the trial court he could add allegations that Donald Kim told him, “We used you as a battering ram to get rid of the former board,” and “We used you as a battering ram because we were afraid of the former board president.” Kim also told the trial court, if leave to amend were granted, he would allege that Donald Kim admitted the defendants had engaged in the post-election misconduct described in his pleading because Donald Kim “wanted to come back as the unelected president of the MPOA board.”

None of these additional allegations, however, would cure the fatal pleading defects in the third amended complaint: the lack of specificity in the fraud allegations, as well as the vague, and therefore unenforceable, promises of support alleged as the basis for that cause of action; the failure of the negligent misrepresentation cause of action to allege an actionable misrepresentation about past or existing facts, as opposed to a statement about future events; and the failure to allege an actionable breach of the MPOA's general duty of care.

Under these circumstances it was not an abuse of discretion for the trial court to deny leave to amend. (See *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081 ["plaintiff has the burden of proving that an amendment would cure the defect"].)

DISPOSITION

The judgment is affirmed. Defendants are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.